Public Service Company of New Mexico, and its wholly owned subsidiaries Avistar, Inc., and Manzano Energy Corporation, a single employer *and* International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO. Case 28–CA–16420

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On August 3, 2001, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed briefs answering the Respondent's exceptions, and the Respondent filed briefs in reply to the answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Public Service Company of New Mexico and its wholly owned subsidiaries Avistar, Inc., and Manzano Energy Corporation, a single employer, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Delete paragraph 2(g) and insert the following in its place.

"(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Lew Harris, Esq., for the General Counsel.
George Cherpelis, Esq. and *Timothy L. Salazar, Esq.*, for the Respondent.
John L. Hollis, Esq., for the Charging Party.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. This case involves issues of whether the Respondent has violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act).[2] More specifically, the issues center on whether the Respondent refused to bargain with the Union about the decisions or effects of the decisions it made (1) requiring employees to wear uniforms, and (2) the elimination of the meter service technician (MST) position. On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

I. JURISDICTION AND LABOR ORGANIZATION

The answer of Public Service Company of New Mexico (PNM) admitted that Manzano Energy Corporation (Manzano) has been a separate operating division of PNM, sharing common ownership and some common officers. PNM further admitted that these two companies have formulated and administered certain common labor policies, have shared common premises, have provided certain services for each other and have held themselves out to the public as a single integrated business enterprise with the intent of reorganizing into two separate affiliated corporations in compliance with the Electric Utility Industry Restructuring Act of 1999.

PNM also admits that, at all times material, Avistar, Inc. (Avistar) has been a separate corporation from PNM, operating as wholly owned subsidiary thereof with some common offi-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's application of the "clear and unmistakable waiver" standard of *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), in determining that the management-rights clause of the parties' collective-bargaining agreement did not privilege the Respondent's unilateral conduct in this case. However, even under the "contract coverage" test applied by the Chairman below, we would reach the same result.

Chairman Hurtgen notes that the judge, in rejecting the Respondent's argument that it acted lawfully pursuant to the management rights clause in its contract with the Union, employed the "clear and unmistakable waiver" analysis of *Metropolitan Edison*, supra. In Chairman Hurtgen's view, the "contract coverage" analysis, set forth by the D.C. Circuit in *NLRB v. Postal Service*, 8 F.3d 832 (1993), is the appropriate test. See, e.g., his partial concurrence in *Mt. Sinai Hospital*, 331 NLRB 895 (2000), enfd. 8 Fed.Appx. 111, 2001 WL 533552 (2d Cir. May 17, 2001). Under a "contract coverage" analysis, Chairman Hurtgen agrees that the Respondent's conduct was not privileged. Unlike the situation in *Mt. Sinai Hospital*, Chairman Hurtgen finds that, in the instant case, the judge correctly determined that, whether analyzed as a change in unit scope or as a unilateral transfer of unit work, the Respondent's actions with respect to the meter service technician classification were unlawful.

[3] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[1] This case was heard at Albuquerque on March 13–15, 2001. All dates in this decision refer to the year 2000 unless otherwise stated.

[2] 29 U.S.C. § 158 (a)(1) and (5).

cers. Avistar and PNM have formulated and administered certain common labor policies, to a limited extent have shared common premises and have provided limited services for each other.

The record shows that PNM and Avistar have signed an administrative service agreement which states that PNM will provide the following labor relations services to Avistar:

> 19. Human Resources, Staffing, Benefits
>
> Provides staffing and recruitment services; compensation design and administration services; benefits administration; employee relations services; compliance support services, e. g., Equal Employment Opportunity and Affirmative Action; loss control and safety services; administration of drug and alcohol testing program; labor relation services; maintenance of PNM's policies and procedures; and assistance in development of procedures and manuals. [GC Exh. 3, schedule B, item 19, p. 5].

In February 2000, PNM gave notice to the Union of its desire to change the terms of their 1997–2000 collective-bargaining agreement by sending the Union two letters. These letters were accompanied by three separate collective-bargaining agreement proposals to be applied separately to the three entities that comprise the Respondents named in this case.

PNM moved to dismiss Avistar and Manzano from the case arguing that no evidence was introduced at trial that implicated these entities in any of the unfair labor practices alleged in the complaint. The Government asserts that all three entities are a single employer and any order finding a violation should be directed against them. The record shows that these entities generally hold themselves out to the public as integrated enterprises, that there is some central control of labor relations among the entities (including bargaining contracts with the Union), and they have some common officers. I find that PNM, Avistar, and Manzano are a single employer and that the remedy set forth below shall attach to all of these entities. *Hydrolines, Inc.*, 305 NLRB 416, 417–419 (1991). I deny the Respondent's motion to dismiss Avistar and Manzano from the complaint. These three entities shall be jointly referred to as the Respondent in this decision. I further find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3] The Respondent admits, and I find that the Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent and the Union have had a collective-bargaining relationship for over 50 years. These parties had a collective-bargaining agreement with a term of May 1, 1997, through May 1, 2000. The unit of employees concerned in this case is:

> All employees of the Respondent's electrical and water transmission, distribution and production departments in the divisions and jobs referenced in the collective-bargaining agreement.

On February 1, each party gave the other notice of a desire to change and modify the agreement and negotiations commenced on March 17. On August 22 the parties reached a tentative agreement for a new labor contract. During the negotiations the parties had extended the terms of their 1997 agreement beyond its May 1, 2000 termination date until they reached agreement on the new contract.

The Respondent's principal agents and representatives concerned with this case are senior human resources consultants, Robert F. Curtis and Sherry Leeson. assistant business manager, Edward N. Misquez, and business manager, Andy Palmer, represented the Union.

The issues involved in this case concern the legality of the circumstances surrounding Respondent's unilateral decisions (1) requiring unit employees to wear uniforms, and (2) removing the Union represented MSTs from the unit and assigning their work to a nonunit utility worker classification.

III. MANDATORY UNIFORMS

The parties' 1997–2000 collective-bargaining agreement, article 47, included the Respondent's "Uniform Purchase Guidelines." These guidelines had been scheduled to expire on May 1, 1999. During negotiations in April 1999, the parties agreed to extend the expiration date to May 1, 2000. The guidelines provided that unit employees were not required to wear uniforms. If they chose to wear uniforms they were eligible for reimbursement up to a limit of $300 with 50 percent of this amount being paid by the Respondent.

On January 26, Curtis sent a letter to the Union that stated effective April 17, "the wearing of specific clothing items" would be required for "field employees working in the Wires and Pipes business unit." The letter further notified the Union that the Respondent was "prepared to meet and discuss the effects of this policy on your unit members prior to its effective date." The draft uniform policy, attached to the January 26 letter, provides, in part, that: "Employees who do not follow this policy are subject to disciplinary action, up to and including termination."

On January 31, Misquez sent a letter to Leeson confirming that during a telephone conversation between them on January 28, the Union had requested bargaining, inter alia, concerning company uniforms and operational changes. Misquez requested that the parties meet and discuss these subjects at the Respondent's earliest convenience

On February 1, Union Representative Palmer delivered a letter to Curtis detailing the Union's proposals for changes to the expiring contract. In pertinent part, the Union proposed significant changes to the management-rights clause, article 7, by deleting paragraphs 3, 5, 6, 7, and 8. Moreover, the Union proposed at page 9 to incorporate the uniform purchase guidelines in the contract. Also on February 1, the Respondent delivered a letter to the Union containing its proposals for three contracts. None of the proposals contained references about making employee uniforms mandatory for unit employees.

On February 7, Leeson wrote to Misquez stating that she understood Misquez' January 31 letter as an affirmative response

[3] The Respondent's answer admits this fact as to PNM and Avistar. As I have found all three entities to be a single employer, I find that Manzano likewise is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act.

"to the Company's request to meet and discuss the effects on unit members of Company uniforms."

On March 14, Curtis wrote to Misquez reiterating the Respondent's intent to implement its mandatory uniform policy on April 17. Curtis stated that the Respondent had "requested bargaining over the 'effects' on your unit members" and recited the fact that the parties had met for that purpose on February 24 and 29, and that Misquez had canceled a meeting scheduled for March 8. Curtis' letter emphasizes that, "[w]ith the April 17, date rapidly approaching and administrative issues associated with the implementation of this mandatory uniform requirement it is imperative that the parties complete this bargaining over the effects on your affected unit members." Curtis proposed the parties meet again on March 20. The "effects" bargaining sessions were always conducted separately from the parties' general contract negotiations.

On March 20, Leeson wrote an e-mail to supervisors concerning the contract negotiations. She described the parties' March 17 first session of general negotiations for a successor labor agreement. Leeson's memo mentions the mandatory uniform policy:

> Ed Tafoya (a union representative) read a statement regarding the Company's recent establishment of a job classification and the requirement for PNM employees to wear uniforms. The Union indicated that they view these subjects as mandatory subjects of bargaining and demand to bargain the issues at contract negotiations. The parties have already met on two occasions to bargain these issues outside of full contract negotiations. The Company stated it disagrees with the Union's position.

On March 20, Misquez and union committee members met with Curtis and his committee and negotiated about the "effects" of the Respondent's decision to require uniforms and, more particularly, the details of the clothing list, percent and amount of reimbursement. No agreement was reached on these subjects and the parties met again on March 28.

Misquez wrote to Curtis on March 31, with a counter offer to the Respondent's last offer of March 28. Curtis replied by letter dated April 10. Curtis letter states in part: "After reviewing the record of the parties' effects bargaining over this matter the Company cannot accept your offer. The Company is unwilling to concede any further." Curtis stated that effective May 15, the wearing of uniforms would be a condition of employment and that the Category 7 clothing "shall be required for all bargaining unit employees." He deleted pants from the list of clothing for which employees would be reimbursed.

Curtis' April 10 letter was posted on the Respondent's substation department bulletin board. The letter also contained handwritten notes. Supervisor Bernie Baldwin told employee Ed Tafoya that department manager, Larry Sullivan, wrote the comments on the letter as he was talking to Leeson. The handwritten notation reads:

> For your information—Regarding Uniforms!
> Note: This offer is a reduction in benefits from the proposal initially discussed and tentatively agreed to—due to union last minute counter offer!
> —Awaiting union counter offer at this time.

On April 19, the parties held a meeting for general negotiations of a successor collective-bargaining agreement. The Union demanded bargaining on the uniform policy for PNM and Manzano employees. The Respondent refused to engage in such bargaining during the general negotiations for a new contract. The Respondent maintained this position throughout general negotiations.

On May 10, Misquez sent a letter to Curtis stating that he understood the Respondent's April 10 proposal to be its last offer and that it was going to be implemented on May 15. Misquez requested that the Respondent grant a 30-day extension before implementing the policy and said the union committee was available to meet and discuss the effects of the policy. In general negotiations the Union continued to demand bargaining on the unilateral implementation of the Respondent's uniform policy. The Respondent continued to refuse to discuss the matter in general negotiations.

On May 23, Curtis wrote a letter to Misquez regarding the separate effects bargaining. He stated that the Respondent "indicated in previous effects bargaining sessions it would notify the Local Union of a change in the effective date of the uniform policy." Curtis continued that because of certain administrative matters the implementation date for the mandatory uniform policy was being changed to July 3. Curtis noted his receipt of Misquez' May 10 letter regarding further "effects bargaining," and the said the Respondent's representatives would be available. Leeson wrote a June 2 letter to the Union confirming a "uniform effects bargaining session" for June 9.

On June 9, the parties met for separate effects negotiations. The Union presented a counter proposal that the Respondent provide uniforms to employees without cost to the employee plus a $25 per month cleaning allowance for the employees. Leeson summarized the meeting in a June 12 e-mail to supervisors. The e-mail reads in pertinent part:

> The Company and Union representatives met on Friday, June 9, to continue the effects bargaining on the requirement for all IBEW represented bargaining unit employees who work in Roger Flynn's business unit to wear uniforms as a condition of employment.
> . . . .
> After lengthy discussion, both the Union and the Company indicated their unwillingness to move from their respective counters and, as a result, are at loggerheads. Therefore, the Company will implement the Company's last counter offer, to be effective July 3, 2000. The Union again asked the Company to negotiate on the Company's decision to make the wearing of uniforms a condition of employment. The Company gave the same answer as before—the Company will not negotiate on its decision.

Leeson distributed a uniform name designation form with her e-mail and instructed the supervisors to have their employees complete and return the forms by Friday, June 16.

The Union, in the general negotiations, continued to demand that the Respondent bargain about both the decision and effects of its decision to require the wearing of uniforms. On June 28,

the Union proposed a new article 47 that contained the following language concerning uniforms:

> UNIFORMS
> BEFORE IT BECOMES A CONDITION OF EMPLOYMENT THAT ANY BARGAINING UNIT EMPLOYEE(S) BE REQUIRED TO WEAR A UNIFORM, IT SHALL BE MUTUALLY AGREED TO BY THE COMPANY AND THE UNION AND THE EMPLOYEE WILL BE PROVIDED WITH THE FOLLOWING, AT MINUMUM [sic]:

The Respondent rejected the proposal. The Union continued to submit the proposal in general negotiations for a new contract but the Respondent always rejected bargaining about the uniform policy in those negotiations and countered that negotiations concerning uniforms were being conducted in the other meetings.

On June 30, the Company distributed its "final Uniform Policy" to the unit employees. The policy states, in part: "Wearing of approved uniform clothing items shall be mandatory as a condition of employment."

The parties continued meeting for general negotiations and on August 22 signed off on a tentative agreement. The subject of uniforms was not incorporated by reference in article 47 as had been the case in the prior collective-bargaining agreement. The subject was mentioned, however, with the language: "The Company will increase the current reimbursement level to $400.00 per year. Additionally, 100% cotton skirts will be added to the approved clothing list." The parties could not agree about bargaining over the Respondent's decision to mandate the wearing of uniforms and determined that the issue be resolved in litigation before the Board.

Curtis testified that he attended a January 17 grievance meeting. The grievance concerned an employee seeking indemnification for legal fees he had incurred after being sued for conduct engaged in during the course of his employment. Curtis testified he had an off-the-record discussion with the Union and told them that the grievance process was the wrong venue to resolve the issue of indemnification. He suggested that if Misquez would write a letter to him requesting negotiation of an indemnification provision that the Respondent would be prepared to negotiate on the subject. Curtis testified that in consideration for such bargaining he got Misquez to agree that the Union would permit the Respondent to mandate that employees wear uniforms. Respondent's senior human relations consultant, Sherry Leeson, was also present at the meeting. She was not called by the Respondent to testify regarding the alleged acquiescence of the Union in allowing the Respondent to require the wearing of uniforms.

Union Representative Edward Tafoya was also in attendance at the January 17 grievance meeting. He denied that any such agreement was made. Misquez also testified that no such agreement was discussed. They both agree that Curtis had suggested that the indemnification grievance could be handled better in negotiations. Subsequent to the grievance meeting Misquez wrote a letter to the Respondent requesting negotiations on an indemnification provision. The letter makes no reference to the alleged agreement by the Union to allow the Respondent to require uniforms.

The mandatory uniform policy was implemented on July 3. The indemnification grievance is still active. While there were subsequent exchanges of correspondence concerning the uniform issue, none mention the alleged uniform agreement. The Respondent submitted a position statement to the Board during the investigation of the case. That statement makes no reference to the alleged uniform agreement. Based on the record as a whole I find that the Union did not agree as a quid pro quo for negotiations on an indemnification clause that the Respondent could mandate that employees wear uniforms.

IV. METER SERVICE TECHNICIANS

The Respondent employed 14 Union represented MSTs in the Albuquerque, New Mexico area who were covered under the terms of the 1997–2000 collective-bargaining agreement. Under that agreement they were paid a rate of $19.85 per hour. The Respondent made a decision to remove the MSTs from the unit, pay them $10.63 per hour and classify them as utility workers. The Government alleges the failure to bargain about that decision and the effects of the decision is a violation of Section 8(a)(1) and (5) of the Act. The Respondent argues it has committed no violation of the Act because it was privileged to make the MST decision under the terms of the contract, and, regardless, the parties ultimately settled the matter through the grievance procedure.

The Respondent did not propose any changes regarding the MSTs when it reopened the contract for negotiations in February. On March 6, Curtis sent letters to the Union and another labor organization, the United Association, Local #412 (UA), requesting a meeting, "to discuss the issues associated with the consolidation of the Electric and Gas Services Meter Technician functions." This change would effect only the Albuquerque MSTs. The UA collective-bargaining agreement with the Respondent does not have a classification of meter service technician but does cover a classification of employees called utility worker.

On March 16, a meeting was held in Farmington, New Mexico, attended by representatives of the Respondent, the Union and the UA. The Respondent's representatives presented a document entitled "Meters and Installation Department Changes Effective April 15, 2000." The document states in part:

> By April 15, 2000, the Meters and Installation Department will have designed and will implement a process whereby functions such as reading double orders, glass changes, disconnects, electric samples/exchanges and gas pressure checks will be performed by employees from the two previous work units, and that gas service technicians will install electric residential single phase meters when appropriate. With the existing systems in place, we will need to dispatch orders from a work unit that can process both types of meter orders.

Misquez stated that the Union wanted to keep the MSTs in its bargaining unit, that the issue should be discussed in the successor contract negotiations, and that he needed to discuss the issue with the Union's attorney. Misquez testified that Cur-

tis told the union representatives that if they did not accept any of the options, the remaining option was "war."

On March 28, An "effects" bargaining meeting took place between the parties. Curtis testified that during the discussions he asked the union representatives "if we bargain over the decision, does that mean if we do not reach agreement, that I cannot consolidate these meter functions." He recalled the union representatives replied, "Yes, that means you cannot do this." Curtis told the Union that it was the Respondent's intent to have the 14 MST's reassigned to the utility worker classification at the gas service center unit where they would be represented by the UA. He stated that one of the reasons for the consolidation was that the Respondent was paying too much for that skill level. Curtis testified that the Respondent never agreed in to bargain general negotiations with the Union about the decision to consolidate the gas and electric meter service functions nor on the effects thereof.

On March 20, Curtis sent a letter to Misquez and UA representative, Blea, regarding a meeting to be held on March 30, "to discuss the effects on your members pursuant to the consolidation of the meter service technician functions." During that meeting Misquez read a statement to Curtis:

> it looks like to us that you the company are asking us to modify our existing agreement and forcing us to change the existing bargaining unit
>
> right now we are engaged in general negotiations and any changes or modifications to the agreement should be addressed at the table
>
> the union does not agree to open the agreement to any changes in classifications and or wage rates for the duration of this agreement.
>
> We will bargain in good faith in the general negotiations all subjects required to include job classifications and wage rates.
>
> We don't think you have the authority to negotiate to change this agreement.
>
> The Union does not want to give up our employees and or take members represented by the U.A. [GC Exh. 31.]

Curtis then made an offer that (1) the MSTs be employed as Utility Workers at $10.63 per hour, and receive a lump sum payment of $14,500, representing the differential for 9 months between their existing wage rate and the new one proposed, or (2) the MSTs could take a voluntary layoff with a severance package as set forth in article 24 B of the contract. If the Union rejected the offer, then the Respondent would implement the following on April 17: employment as utility workers at $10.63 per hour "in the newly consolidated meter services function" with a lump sum of $14,500, but with no voluntary layoff option. Any MST not accepting the employment offer as utility workers "would be viewed as a having voluntarily resigned employment with the Public Service Company of New Mexico."

Following that meeting Curtis gave Misquez a letter that stated, "consolidation of the Meter Service Technician functions in the Albuquerque metro area" would occur on April 17. The letter concluded, "Again as I previously stated, the Company representatives will make themselves available to bargain over the affects [sic] on the unit members."

On April 5, Misquez sent Curtis a letter accepting the proposal to meet and to "bargain on the decision to consolidate the Meter Service Technicians." Misquez also asked the effective date of the consolidation be extended to May 17.

Curtis replied by letter dated April 11 disputing Misquez' statement that the Respondent was willing to bargain over the decision to consolidate the meter service functions:

> I am somewhat confused and perplexed by your second request as the parties have continued to recognize the Company's sole right to determine its operating policies and manage its business in light of experience, business judgement and changing conditions.[4] Therefore, the Company accepts your invitation to now bargain over the effects of this consolidation on your unit members.

In the general negotiations the Union continued to demand bargaining about the Respondent's decision to take the MSTs out of the bargaining unit. The Respondent insisted it was free to make the consolidation without the consent of the Union.

The parties met on April 27, for effects bargaining. The Union wanted to know what it would take to keep the MSTs in the unit. Curtis presented an offer that would have reduced or eliminated a number of contractual benefits. The Respondent's offer provided in item #9: "This agreement would supercede any changes in a successor labor agreement." The Union rejected that proposal and asserted that such matters should be discussed in general negotiations.

Misquez wrote a letter to the Respondent on May 2, in which he requested further effects bargaining and an extension of the consolidation date of May 17. Leeson replied by letter dated May 5, agreeing to meet May 8, 10, 11, and 12. She rejected the request for an extension of the effective date.

On May 8, the parties met and the Union again insisted on keeping the MSTs in its bargaining unit. Additionally, the Union demanded that the decision to consolidate be bargained about in the successor contract general negotiations. The Respondent rejected these demands. Curtis gave the Union the Respondent's "last, best and final offer." The offer had two options. Option 1 reiterated the Respondent's April 27 offer of retaining MST's in the unit but reducing their pay and placing new limitations on the rights of these employees regarding overtime, etc. Option 2 was similar to that outlined in Curtis' March 30 letter setting forth two options, except that the lump sum payment offer to employees was reduced from $14,500 to $12,000. This option would place the MST's in the UA unit as Utility Workers. The offer was good until May 15, and concluded that:

> It is important for the IBEW and the affected unit members to understand that in the event both of the above two offers are rejected, the Company intends to implement the following on May 17, 2000:

[4] This is a reference to language contained in the management-rights clause of the parties' collective-bargaining agreement.

1. The Company will provide written offers of full-time regular employment in the Utility Worker classification at the hourly rate of $10.63.

2. Meter Service Technicians not accepting the employment offers in the Utility Worker positions will be viewed as having voluntary resigned employment with the Public Service Company of New Mexico.

Misquez responded to this offer in a May 10 letter. He again requested bargaining about the Respondent's decision to consolidate. He pointed out the Respondent's refusal to discuss the matter in general negotiations and noted that the Respondent's option 1, number 9, tied the consolidation issue to the successor labor agreement ("This agreement would supercede any changes in a successor labor agreement.") Misquez' letter also states in part:

> As you know, management rights, job classifications, overtime meals, and wage rates, are all open items in the current negotiations. We have not reached a lawful impasse. Under the current Collective Bargaining Agreement you are insisting upon transferring bargaining work out of the bargaining unit, and transferring it into another bargaining unit. This is in clear violation of the current Collective Bargaining Agreement, including the Union Recognition Clause.

On May 10, Curtis responded by letter, noting that the parties had been negotiating "over the *effects* of the referenced consolidation" Curtis pointed out the parties had been unable to reach an agreement. He withdrew Option 1, and citing the Respondent's "right to manage its business," left option 2 and the failure to accept consequences in the earlier offer open until May 15.

By letter dated May 15, Misquez reluctantly accepted the Respondent's option 2 offer. He reserved the Union's right to legal recourse concerning the consolidation actions of the Respondent.

On May 17, the Respondent implemented the consolidation of the MST functions as set forth in its option 2. The effect of this change was that 7 of the 14 MSTs were made utility workers at a reduced hourly rate of $10.63 and 7 accepted the voluntary separation severance package. Those MSTs who became utility workers were transferred to the unit represented by the UA. MSTs would still do their same work at the their normal locations—customers' residences. Their reporting location was changed from the electric service center to the adjacent gas service center.

Curtis testified that the Respondent continued to reject the Union's efforts to discuss the consolidation decision in general negotiations. Curtis also testified that labor costs played a major role in the Respondent's decision to consolidate the electric and gas meter service functions.

On June 5, the Union filed a grievance on behalf of the Albuquerque MSTs. On July 18, the Union delivered the 30-day notice of termination of the collective-bargaining agreement and all addenda thereto. The original complaint and notice of hearing issued July 31. In July the unit employees voted to strike. Their strike intentions included a protest against the Respondent's claimed unfair labor practices, including the MST issue.

On August 18, the Respondent settled the MST grievance. The settlement stated that the grievants could not return to their prior defined benefit pension plan. The settlement also provided that it was "entered into on a non-precedent setting basis and does not prejudice anyone's position (or positions) at any adjudicative process or administrative tribunal."

V. ANALYSIS

It is axiomatic that during the term of a collective-bargaining agreement, an employer violates Section 8(a)(1) and (5) of the Act by modifying a term of the agreement without the union's consent, or the union's "clear and unmistakable" waiver of its statutory right to bargain concerning the matters at issue. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Bonnell/Tredgar Industries*, 313 NLRB 789, 790 (1994), enfd. 46 F.3d (4th Cir. 1995) ("It is well settled that an Employer violates Section 8(a)(5) and (1) of the Act as elucidated in Section 8(d) of the Act, by modifying a term of a collective-bargaining agreement without the consent of the other party while the contract is in effect.").

During the term of the 1997–2000 contract, the Respondent announced two unilateral decisions that effected unit employees and changed the terms of the contract. The Respondent refused to bargain about these decisions, but invited separate bargaining about the effects of the decisions. On each of the two issues the Union consistently demanded bargaining about the Respondent's decisions both under the old agreement and during negotiations for the successor agreement. The Respondent consistently refused to bargain about these decisions. The effects bargaining yielded no agreements that incorporated negotiations about its decisions. The Respondent then implemented its MST consolidation on May 17. On July 3, the Respondent implemented its decision requiring the wearing of uniforms.

The parties' 1997–2000 agreement had a waiver of bargaining clause reading:

Article 43—Waiver

> The Company and the Union acknowledge that during the collective bargaining negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any matter, or subject not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at after the full and unfettered exercise of that right and opportunity are set forth in this Agreement.
>
> Accordingly the Company and the Union, for the term of this Agreement, each voluntarily, unqualifiedly and without reservation waives the right, and each agrees the other shall have no obligation to bargain with respect to any subject or matter specifically referred to or covered within the terms of this Agreement, or with respect to any other subject, or matter not specifically referred to or covered in this Agreement, irrespective of whether or not such subject or matter had been within the knowledge or contemplation of either or both parties at the time this Agreement was negotiated or executed. [GC Exh. 4 at p. 37.]

Under the terms of this waiver clause neither party was required to bargain about any matter covered by the terms of their agreement. Uniforms and the MSTs wages, conditions of employment, etc., were clearly a part of that agreement.

The parties' agreement also contained a management-rights clause that in pertinent part states:

> Article 7—Management Rights:
>
> A. The Union and its members recognize the sole right of the Company to determine its operating policies and manage its business in light of experience, business judgment and changing conditions. The exercise of such authority shall not conflict with the Agreement.
>
> Management's rights shall include, by way of illustration, and not by way of limitation, the right to:
>
> . . . .
>
> 5. prepare and make available job specifications and establish job classifications . . .
>
> 6. make reasonable rules and regulations governing the operation of its business and the conduct of its employees, and revise and modify such rules and regulations from time to time as the Company deems necessary. [GC Exh. 4 at p. 5.]

The Board requires that a union's waiver of its bargaining rights be specific. Absent such a waiver, an employer is not privileged to take unilateral action concerning a mandatory subject of bargaining. *Johnson-Bateman Co.*, 295 NLRB 180 (1989). None of the language of the management-rights clause expresses such a specific waiver. Moreover, the management-rights clause states that the Respondent's rights exercised under the clause "shall not conflict with the Agreement." The agreement set forth the MST's conditions of employment and also states the wearing of uniforms by unit employees is not required. I find that the management-rights clause is not a waiver of the Union's right to bargain over the decisions to mandate employees wear uniforms or the consolidation of the MST functions nor does it sanction the right of the Respondent to implement decisions in these areas without bargaining about those decisions. I further find that by participating in effects bargaining about these subjects, the Union did not waive its right to insist on the Respondent bargaining about its decisions.

The Respondent argues that the MST settlement equates to the matter no longer requiring attention under the Act. Although the MST grievance was settled this alternative cannot serve as a substitute for adherence to the principle of good-faith collective bargaining. The states the MSTs were not allowed to "accrue any additional pension benefits as provided for under the Company's defined benefit pension plan." Thus, the MSTs were not made whole by the parties' settlement. The settlement specifically reserves the parties' positions for litigation before an administrative tribunal. I find the settlement agreement does not prevent the Board effectuating the purposes of the Act by issuing an order in this case.[5]

The Respondent's brief specifically disputes the complaint allegations which assert that it "refused to discuss, negotiate, and bargain about the decisions or the *effects* of the decisions" (emphasis added). The Respondent points out that the parties negotiated the effects of its mandatory uniform and MST consolidation policies on numerous occasions. That observation is not disputed. I reject, however, the argument that the effects bargaining that took place insulates the Respondent from a finding that the Act was violated. The Respondent's unlawful conduct, i.e., unilaterally imposing its decisions, left the Union little choice but to attempt to protect the employees' interests as best it could until the matter could be resolved by litigation. I find that the Respondent cannot rely on this defense to avoid a remedial order that incorporates a requirement of good-faith bargaining over the decision and effects.

The unilateral decision to consolidate the MST functions resulted in the elimination of a job classification covered by the 1997–2000 collective-bargaining agreement and the transfer or separation of employees in that classification. Those MST remaining in the Respondent's employment received less compensation as a result of the action. They also lost their right to representation by the Union. Nonetheless the Respondent refused to bargain about the decision to consolidate. Such a consolidation that results in the extinguishing of a unit of represented employees and causes a substantial change in their terms and conditions of employment is a mandatory subject of bargaining. *Mt. Sinai Hospital*, 331 NLRB 895 (2000) (even were the respondent's unilateral change to constitute a transfer of unit work, rather than an alteration of the unit, the respondent violated Sec. 8(a)(5) because there had been no agreement, impasse, or waiver); *Holy Cross Hospital*, 319 NLRB 1361 fn. 2 (1995) (once a specific job has been included within the scope of the unit by either Board action or the consent of the parties, the employer cannot remove the position without first securing the consent of the union or the Board); *Hill-Rom Co.*, 957 F.2d 454, 457 (7th Cir. 1992). I find that the Respondent's refusal to bargain about the consolidation decision was a violation of Section 8(a)(1) and (5) of the Act.

I find that even if the Respondent was viewed as not eliminating a position from the unit, but only transferring unit work, it was still obligated to bargain with the Union about its decision effects. *Holmes & Narver/Morrison-Knudsen*, 309 NLRB 146–148 (1992) (the decision here did not involve capital investment, did involve labor cost considerations, and, as a common subject of bargaining in industrial practice, is clearly amenable to bargaining).

The Respondent's unilateral decision requiring the unit employees to wear uniforms is a mandatory subject of bargaining. *St. Luke's Hospital*, 314 NLRB 434 fn. 1, 440 (1994); *United Technologies Corp.*, 286 NLRB 693, 694 fn.1 (1987). The Respondent refused to bargain about that decision and agreed only to negotiate over the effects of its decision. The effects bargaining was tainted by the Respondent's unilateral decision to impose the new uniform policy on the employees. I find, therefore, that the Respondent's refusal to bargain about its manda-

[5] "The Board is empowered . . . . to prevent any person from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." NLRA, Sec. 10(a).

tory uniform decision is a violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Katz*, 369 U.S.736 (1962).

CONCLUSIONS OF LAW

1. Public Service Company of New Mexico, and its wholly owned subsidiaries, Avistar, Inc., and Manzano Energy Corporation, Inc., are a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[6]

ORDER[7]

The Respondent, Public Service Company of New Mexico, and its wholly owned subsidiaries, Avistar, Inc., and Manzano Energy Corporation, Inc., Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO about the decision and effects of removing the work of electric meter service technicians from the collective-bargaining unit and unlawfully implementing the decision to remove such work from the unit.

(b) Refusing to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO about the decision and effects of requiring unit employees to wear uniforms and unlawfully implementing the decision to require unit employees to wear uniforms.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, rescind the decision to require unit employees to wear uniforms, and bargain in good faith with the Union before implementing a requirement that unit employees wear uniforms.

(b) On request of the Union, rescind the decision concerning moving the work of the electric meter service technicians to a unit that is not represented by the International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO.

(c) On request of the Union rescind the decision concerning the consolidation of the electric meter service technicians and modify the settlement of the grievance on that issue to restore the situation to that which existed before the consolidation decision was made.

(d) Offer employment to any electric meter service technician who took voluntary lay off as a result of the transfer of that work to the position of utility worker.

(e) Make employees, including electric meter service technician who took voluntarily layoff as a result of the consolidation, whole for any loss of wages and benefits that they may have suffered as a result of the Respondent's unlawful actions set forth herein. Backpay, if there is any, shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent, if any, that unit employees lost coverage for various benefits provided under the collective-bargaining agreement, the Respondent shall reimburse them for any expenses incurred as a result of their noncoverage, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

(f) Make employees whole for any costs they may have incurred as the result of the Respondent's unlawful requirement that they wear uniforms

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1135 (1999)

(h) On request of the Union, bargain with it as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees of the Respondents electric and water transmission, distribution, and production departments in the divisions and jobs referenced in the parties' collective-bargaining agreement of May 1, 1997, through May 1, 2000.

(i) Within 14 days after service by the Region, post at its facility in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] The Government filed an unopposed motion with in its brief seeking to correct certain errors in the transcript. I grant that motion.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 26, 2000. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

Unlawfully removing the work of electric meter service technicians from the collective bargaining unit, and removing the employees doing that work from the coverage of the collective-bargaining agreement with the Union.

WE WILL NOT refuse to bargain about our decision and its effects concerning the assignment of electric meter service technicians' work and the employees performing that work to a job classification of utility worker that is excluded from the unit.

WE WILL NOT unlawfully implement the decision to remove electric meter service technicians' work from the unit.

WE WILL NOT refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO about the decision and effects of requiring unit employees to wear uniforms

WE WILL NOT unlawfully implement the decision to require unit employees to wear uniforms.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the International Brotherhood of Electrical Workers, Local Union No. 611, AFL–CIO, bargain with it in good faith as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees of the Respondents electric and water transmission, distribution, and production departments in the divisions and jobs referenced in the parties' collective-bargaining agreement of May 1, 1997, through May 1, 2000

WE WILL, on request of the Union, rescind the decision to require unit employees to wear uniforms, and bargain in good faith with the Union before implementing a requirement for the mandatory wearing of uniforms.

WE WILL, on request of the Union rescind the decision concerning the consolidation of the electric meter service technicians and modify the settlement of the grievance of that issue to restore the situation to that which existed before the decision was made.

WE WILL offer employment to any electric meter service technician who took voluntary layoff as a result of the transfer of that work to the position of utility worker.

WE WILL make unit employees, including electric meter service technician who took voluntarily layoff as a result of the consolidation, whole for any loss of wages, benefits or costs associated with the moving of electric meter service technicians to the utility worker classification and the mandatory requirement they wear uniforms.

PUBLIC SERVICE CO. OF NEW MEXICO, AND ITS WHOLLY OWNED SUBSIDIARIES, AVISTAR, INC., AND MANZANO ENERGY CORPORATION